RULES
OF
TENNESSEE DEPARTMENT OF STATE
ADMINISTRATIVE PROCEDURES DIVISION

CHAPTER 1360-4-1
UNIFORM RULES OF PROCEDURE FOR HEARING CONTESTED CASES BEFORE STATE ADMINISTRATIVE AGENCIES

TABLE OF CONTENTS

1360-4-1-.01 SCOPE.

(1) Subject to any superseding federal or state law, these rules shall govern contested case proceedings before all agencies that have adopted these rules, and will be relied upon by administrative judges in all contested cases utilizing administrative judges from the Administrative Procedures Division of the Office of the Secretary of State (whether sitting alone or with the agency), except where an agency has lawfully adopted a rule pursuant to *T.C.A. §4-5-219* (d) that is contrary to any provision to these rules. However, rule 1360-4-1-.20 applies to all administrative judges and hearing officers of the state of Tennessee.

(2) Any provision of these rules may be suspended where clearly warranted in the interest of justice.

(3) In any situation that arises that is not specifically addressed by these rules, reference may be made to the Tennessee Rules of Civil Procedure for guidance as to the proper procedure to follow, where appropriate and to whatever extent will best serve the interests of justice and the speedy and inexpensive determination of the matter at hand.

(4) Agencies are encouraged to adopt their own rules of procedure to address specific topics that are unique to the type of cases conducted by an agency, to whatever extent these rules do not address such topics.

Authority: *T.C.A. §§4-5-219 and 4-5-321.* ***Administrative History:*** *Original rule filed November 22, 1978; effective January 8, 1979. Amendment filed May 23, 1984; effective June 22, 1984. Repeal and new rule filed November 25, 1986; effective January 9, 1987. Amendment filed May 31, 1990; effective July 15, 1990.*

1360-4-1-.02 DEFINITIONS.

(1) Pleadings - ‘‘Pleadings’’ are written statements of the facts and law which constitute a party’s position or point of view in a contested case and which, when taken together with the other party’s pleadings, will define the issues to be decided in the case. Pleadings may be in legal form - as for example, a ‘‘Notice of Hearing and Charges’’, ‘‘Petition for Hearing’’ or ‘‘Answer’’ - or, where not practicable to put them in legal form, letters or other papers may serve as pleadings in a contested case, if necessary to define what the parties’ positions are and what the issues in the case will be.

(Rule 1360-4-1-.02, continued)

(2) Filing - Unless otherwise provided by law or by these rules, ''filing'' means actual receipt by the entity designated to receive the required materials.

(3) Petitioner - The ''petitioner'' in a contested case proceeding is the ''moving'' party, i.e., the party who has initiated the proceedings. The petitioner usually bears the ultimate burden of proof and will therefore present his or her proof first at the hearing. In some cases, however, the party who initiated the proceedings will not be the party with the burden of proof on all issues. In such cases, the administrative judge will determine the order of proceedings, taking into account the interests of fairness, simplicity, and the speedy and inexpensive determination of the matter at hand. The ''petitioner'' is usually a state agency or department.

(4) Respondent - The ''respondent'' in a contested case proceeding is the party who is responding to the charges or other action brought by the ''petitioner''.

(5) Administrative Judge - Wherever the term ''administrative judge'' is used in these rules, it is intended to include reference to the term ''hearing officer,'' in cases in which hearing officers conduct the proceedings.

(6) Administrative Procedures Division - The Administrative Procedures Division of the Office of the Secretary of State, 312 8th Floor, William R. Snodgrass Tower, Nashville, Tennessee 37243; Telephone (615) 741-7008.

(7) Burden of Proof - The ''burden of proof'' discussed in the definition of ''petitioner'' above refers to the duty of a party to present evidence on and to show, by a preponderance of the evidence, that an allegation is true or that an issue should be resolved in favor of that party. A ''preponderance of the evidence'' means the greater weight of the evidence or that, according to the evidence, the conclusion sought by the party with the burden of proof is the more probable conclusion. The burden of proof is generally assigned to the party who seeks to change the present state of affairs with regard to any issue. The administrative judge makes all decisions regarding which party has the burden of proof on any issue.

Authority: *T.C.A. §§4-5-219, 4-5-301(b), and 4-5-312; Cross reference T.C.A §4-5-102.* ***Administrative History:*** *Original rule filed November 22, 1978; effective January 8, 1979. Amendment filed May 23, 1984; effective June 22, 1984. Repeal and new rule filed November 25, 1986; effective January 9, 1987. Amendment filed May 31, 1990; effective July 15, 1990.*

1360-4-1-.03 FILING AND SERVICE OF PLEADINGS AND OTHER MATERIALS.

(1) All pleadings, petitions for review, and any other materials required to be filed with an agency or the Administrative Procedures Division by a time certain shall be filed by delivering such materials in person or in any other manner, including by mail, so long as they are actually received by the Administrative Procedures Division or the agency within the required time period.

(2) Once the Administrative Procedures Division has become involved in any contested case proceeding, all pleadings and other materials required to be filed or submitted prior to the hearing of a contested case shall be filed with the Administrative Procedures Division, where they will be stamped with the date and hour of their receipt. Petitions for agency review of an initial order and for agency reconsideration or stay of a final order may be filed with either the agency or the Administrative Procedures Division and should preferably be filed with both. Whenever an agency or the Administrative Procedures Division receives any such petition, it shall forward a copy to the other.

(3) Discovery materials that are not actually introduced as evidence need not be filed, except as provided at rule 1360-4-1-.11 (3).

(Rule 1360-4-1-.03, continued)

(4) Copies of any and all materials filed with the agency or Administrative Procedures Division in a contested case shall also be served upon all parties, or upon their counsel, once counsel has made an appearance. Any such material shall contain a statement indicating that copies have been served upon all parties. Service may be by mail or by hand delivery.

Authority: *T.C.A. §4-5-219.* ***Administrative History:*** *Original rule filed November 22, 1978; effective January 8, 1979. Amendment filed May 23, 1984; effective June 22, 1984. Repeal and new rule filed November 25, 1986; effective January 9, 1987. Amendment filed May 31, 1990; effective July 15, 1990.*

1360-4-1-.04 TIME.

(1) In computing any period of time prescribed or allowed by statute, rule, or order, the date of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(2) Except in regard to petitions for review under *T.C.A. §§4-5-315, 4-5-317, and 4-5-322*, or where otherwise prohibited by law, when an act is required or allowed to be done at or within a specified time, the agency or the administrative judge may, at any time, (a) with or without motion or notice order the period enlarged if the request is made before the expiration of the period originally prescribed or as extended by previous order, or (b) upon motion made after the expiration of the specified period, permit the act to be done late, where the failure to act was the result of excusable neglect. Nothing in this section shall be construed to allow any ex parte communications concerning any issue in the proceeding that would be prohibited by *T.C.A. §4-5-304.*

Authority: *T.C.A. §4-5-219.* ***Administrative History:*** *Original rule filed November 22, 1978; effective January 8, 1979. Amendment filed May 23, 1984; effective June 22, 1984. Repeal and new rule filed November 25, 1986; effective January 9, 1987.*

1360-4-1-.05 COMMENCEMENT OF CONTESTED CASE PROCEEDINGS.

(1) Commencement of Action. A contested case proceeding may be commenced by original agency or public action, by appeal of a person from an agency action, by request for hearing by an affected person, or by any other lawful procedure.

(2) Notice of Hearing. In every contested case, a notice of hearing shall be issued by the agency, which notice shall comply with *T.C.A. §4-5-307 (b).*

(3) Supplemented Notice. In the event it is impractical or impossible to include in one document every element required for notice, elements such as time and place of hearing may be supplemented in later writings. In certain cases, such as those brought before the Civil Service Commission, some requirements of this subsection may be satisfied during the course of prehearing conferences.

(4) Filing of Documents. When a contested case is commenced in which an administrative judge from the Administrative Procedures Division will be conducting the proceedings, the agency shall provide the Administrative Procedures Division with all the papers that make up the notice of hearing and with all pleadings, motions, and objections, formal or otherwise, that have been provided to or generated by the agency. Legible copies may be filed in lieu of originals.

(5) Answer. The party may respond to the charges set out in the notice or other original pleading by filing a written answer with the Agency in which the party may:

(Rule 1360-4-1-.05, continued)

(a) Object to the notice upon the ground that it does not state acts or omissions upon which the Agency may proceed.

(b) Object on the basis of lack of jurisdiction over the subject matter.

(c) Object on the basis of lack of jurisdiction over the person.

(d) Object on the basis of insufficiency of the notice.

(e) Object on the basis of insufficiency of service of the notice.

(f) Object on the basis of failure to join an indispensable party.

(g) Generally deny all the allegations contained in the notice or state that he is without knowledge to each and every allegation, both of which shall be deemed a general denial of all charges.

(h) Admit in part or deny in part allegations in the notice and may elaborate on or explain relevant issues of fact in a manner that will simplify the ultimate issues.

(i) Assert any available defense.

(6) Motion for More Definite Statement. Within two (2) weeks after service of the notice of hearing in a matter, or at any later time with the permission of the administrative judge for good cause shown, a party may file a motion for more definite statement pursuant to *T.C.A. §4-5-307* on the ground that the notice or other original pleading is so indefinite or uncertain that one cannot identify the transaction or facts at issue or prepare a defense. The administrative judge may order a more definite statement to be provided by a date certain and may continue the hearing until at least ten (10) days after a more definite statement is provided.

(7) Amendment to Notice. The petitioner may amend the notice or other original pleading within two (2) weeks from service of the notice and before an answer is filed, unless the respondent shows to the administrative judge that undue prejudice will result from this amendment. Otherwise the petitioner may only amend the notice or other original pleading by written consent of the respondent or by leave of the administrative judge and leave shall be freely given when justice so requires. No amendment may introduce a new statutory violation without original service and running of times applicable to service of the original notice. The administrative judge may grant a continuance if necessary to assure that a party has adequate time to prepare for a hearing in response to an amendment.

(8) Amendments to Conform to the Evidence - When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time; but failure to so amend does not affect the result of the determination of these issues. If evidence is objected to at the hearing on the ground that it is not within the issues in the pleadings, the administrative judge may allow the pleadings to be amended unless the objecting party shows that the admission of such evidence would prejudice his defense. The administrative judge may grant a continuance to enable the objecting party to have reasonable notice of the amendments.

Authority: *T.C.A. §§4-5-219, 4-5-301, 4-5-307, 4-5-308, 4-5-312, and 4-5-313.* ***Administrative History:*** *Original rule filed November 22, 1978; effective January 8, 1979. Amendment filed May 23, 1984; effective June 22, 1984. Repeal and new rule filed November 25, 1986; effective January 9, 1987. Amendment filed May 31, 1990; effective July 15, 1990*

1360-4-1-.06 SERVICE OF NOTICE OF HEARING.

(1) In any case in which a party has requested a hearing from an agency and provided the agency with an address, a copy of the notice of hearing shall, within a reasonable time before the hearing, be delivered to the party to be affected at the address provided, by certified or registered mail, personal service, or service by the methods set forth in paragraphs (2) and (3) of this rule.

(2) In any case in which an agency is initiating proceedings against a party by bringing charges, by attempting to take action against a license, or by other similar action, a copy of the notice of hearing shall be served upon the party to be affected no later than 30 days prior to the hearing date. Except as provided in paragraph (3) below, service in such a case shall be by personal service, return receipt mail or equivalent carrier with a return receipt; a person making personal service on a party shall return a statement indicating the time and place of service, and a return receipt must be signed by the party to be affected. However, if the party to be affected evades or attempts to evade service, service may be made by leaving the notice or a copy thereof at the party's dwelling house or usual place of abode with some person of suitable age and discretion residing therein, whose name shall appear on the proof of service or return receipt card. Service may also be made by delivering the notice or copy to an agent authorized by appointment or by law to receive service on behalf of the individual served, or by any other method allowed by law in judicial proceedings.

(3) Where the law governing an agency includes a statute allowing for service of the notice by mail, without specifying the necessity for a return receipt, and a statute requiring a person to keep the agency informed of his or her current address, service of notice shall be complete upon placing the notice in the mail in the manner specified in the statute, to the last known address of such person. However, in the event of a motion for default where there is not indication of actual service on a party, the following circumstances will be taken into account in determining whether to grant the default, in addition to whether service was complete as defined above:

(a) Whether any other attempts at actual service were made;

(b) Whether and to what extent actual service is practicable in any given case;

(c) What attempts were made to get in contact with the party by telephone or otherwise; and

(d) Whether the agency has actual knowledge or reason to know that the party may be located elsewhere than the address to which the notice was mailed.

(4) The methods of service authorized and time limits required pursuant to paragraphs (1) through (3) of this rule shall apply only to the initial notice of hearing required to be filed pursuant to rule 1360-4-1-.05 (2) which is intended by the filing agency to memorialize the commencement of a contested case proceeding as described by rule 1360-4-1-.05 (1). All other documents including, but not limited to, supplemented notice pursuant to rule 1360-4-1-.05 (3), and notices of continuances that are ordered or required by statute or rule to be served during the course of the resulting contested case proceeding shall not be required to be served by return receipt mail or its equivalent, or by personal service.

Authority: *T.C.A. §§4-5-202, 4-5-204, 4-5-301, and 4-5-307.* ***Administrative History:*** *Original rule filed November 22, 1978; effective January 8, 1979. Amendment filed May 23, 1984; effective June 22, 1984. Repeal and new rule filed November 25, 1986; effective January 9, 1987. Amendment filed May 31, 1990; effective July 15, 1990. Amendment filed February 27, 2004; effective June 28, 2004.*

1360-4-1-.07 DECLARATORY ORDERS.

(1) Any affected person may petition an agency for a declaratory order as to the validity or the applicability of a statute, rule or order within the primary jurisdiction of the agency.

(2) The petition seeking a declaratory order shall be filed in writing with the agency.

(Rule 1360-4-1-.07, continued)

(3) The form of such petitions shall be substantially as follows:

(a) Petition for Declaratory Order Before the (Division) of the (Agency).

1. Name of Petitioner

_____

2. Address of Petitioner

_____

3. Agency rule, order, or statutory provision on which declaratory order is sought

_____

4. Statement of the facts of the controversy and description of how this rule, order or statute affects or should affect the Petitioner.

5. Description of requested ruling _____

_____

_____

Signature of Petitioner

_____

Address

_____

Date

(4) In the event the agency convenes a contested case hearing pursuant to this rule and *T.C.A. §4-5-223*, then the Administrative Procedures Division shall be notified immediately and shall be provided originals or legible copies of all pleadings, motions, objections, etc.

Authority: *T.C.A. §§4-5-219 and 4-5-223.* ***Administrative History:*** *Original rule filed November 22, 1978; effective January 8, 1979. Amendment filed May 23, 1984; effective June 22, 1984. Repeal and new rule filed November 25, 1986; effective January 9, 1987.*

1360-4-1-.08 REPRESENTATION BY COUNSEL.

(1) Any party to a contested case hearing may be advised and represented, at the party's own expense, by a licensed attorney.

(2) Any party to a contested case may represent himself or herself or, in the case of a corporation or other artificial person, may participate through a duly authorized representative such as an officer, director or appropriate employee.

(3) A party to a contested case hearing may not be represented by a non-attorney, except in any situation where federal law so requires or state law specifically so permits.

(4) The State shall notify all parties in a contested case hearing of their right to be represented by counsel. An appearance by a party at a hearing without counsel may be deemed a waiver of the right to counsel.

(5) Entry of an appearance by counsel shall be made by:

(Rule 1360-4-1-.08, continued)

(a) the filing of pleadings;

(b) the filing of a formal or informal notice of appearance; or

(c) appearance as counsel at a prehearing conference or a hearing.

(6) After appearance of counsel has been made, all pleadings, motions, and other documents shall be served upon such counsel.

(7) Counsel wishing to withdraw shall give written notice to the agency and the Administrative Procedures Division.

(8) Out-of-state counsel shall comply with *T.C.A. §23-3-103(a*) and Supreme Court Rule 19, except that the affidavit referred to in Supreme Court Rule 19 shall be filed with the director of the Administrative Procedures Division, with a copy to the administrative judge presiding in the matter in which counsel wishes to appear.

Authority: *T.C.A. §§4-5-219, 4-5-301(b), 4-5-305, and 4-5-312.* ***Administrative History:*** *Original rule filed November 22, 1978; effective January 8, 1979. Amendment filed May 23, 1984; effective June 22, 1984. Repeal and new rule filed November 25, 1986; effective January 9, 1987. Amendment filed May 31, 1990; effective July 15, 1990.*

1360-4-1-.09 PREHEARING MOTIONS.

(1) Scope - This rule applies to all motions made prior to a hearing on the merits of a contested case, except that discovery-related motions shall not be subject to Interlocutory Review by an agency under this rule. This rule does not preclude the administrative judge from convening a hearing or converting a prehearing conference to a hearing at any time pursuant to *T.C.A. §4-5-306 (b)* to consider any question of law.

(2) Motions - Parties to a contested case are encouraged to resolve matters on an informal basis; however, if efforts at informal resolutions fail, any party may request relief in the form of a motion by serving a copy on all parties and, if an administrative judge is conducting the contested case, by filing the motion with the Administrative Procedures Division, Office of the Secretary of State. Any such motion shall set forth a request for all relief sought, and shall set forth grounds which entitle the moving party to relief.

(3) Time Limits; Argument - A party may request oral argument on a motion; however, a brief memorandum of law submitted with the motion is preferable to oral argument. Each opposing party may file a written response to a motion, provided the response is filed within seven (7) days of the date the motion was filed. A motion shall be considered submitted for disposition seven (7) days after it was filed, unless oral argument is granted, or unless a longer or shorter time is set by the administrative judge.

(4) Oral Argument - If oral argument is requested, the motion may be argued by conference telephone call.

(5) Affidavits; Briefs and Supporting Statements

(a) Motions and responses thereto shall be accompanied by all supporting affidavits and briefs or supporting statements. All motions and responses thereto shall be supported by affidavits for facts relied upon which are not of record or which are not the subject of official notice. Such affidavits shall set forth only facts which are admissible in evidence under *T.C.A. §4-5-313*, and to which the affiants are competent to testify. Properly verified copies of all papers or parts of papers referred to in such affidavits may be attached thereto.

(b) In the discretion of the administrative judge, a party or parties may be required to submit briefs or supporting statements pursuant to a schedule established by the administrative judge.

(6) Disposition of Motions; Drafting the Order

(a) When a prehearing motion has been made in writing or orally, the administrative judge shall render a decision on the motion by issuing an order or by instructing the prevailing party to prepare and submit an order in accordance with (b) below.

(b) The prevailing party on any motion shall draft an appropriate order, unless waived by the administrative judge. This order shall be submitted to the administrative judge within five (5) days of the ruling on the motion, or as otherwise ordered by the administrative judge.

(c) The administrative judge after signing any order shall cause the order to be served forthwith upon the parties.

(7) Interlocutory Review Prior to Hearing - Any party who wishes to seek interlocutory agency review of an administrative judge's decision on a preliminary matter shall make application to the administrative judge for permission to seek such review. If the administrative judge determines that interlocutory review is appropriate, an order may be entered specifying the procedures for obtaining such review. The administrative judge may in such order set a specific time period, at the conclusion of which the requested review shall be deemed to have been denied by the agency if no action has been taken by the agency to decide the matter or extend the time for action. If no specific time period is set, the matter may be set for consideration by the agency at a time certain or at the agency's next business meeting. Nothing in this rule shall preclude the right to seek interlocutory judicial review under T.C.A. §4-5-322(a). It is the intent of this rule that interlocutory agency review not be granted where to do so would significantly delay the resolution of the proceedings, unless the administrative judge deems the issue to be one on which agency determination is particularly appropriate for policy or other reasons.

Authority: *T.C.A. §§4-5-219, 4-5-301(b), 4-5-306, 4-5-308, and 4-5-312.* ***Administrative History:*** *Original rule filed November 22, 1978; effective January 8, 1979. Amendment filed May 23, 1984; effective June 22, 1984. Repeal and new rule filed November 25, 1986; effective January 9, 1987. Amendment filed May 31, 1990; effective July 15, 1990.*

1360-4-1-.10 CONTINUANCES.

(1) Continuances may be granted upon good cause shown in any stage of the proceeding. The need for a continuance shall be brought to the attention of the agency or administrative judge as soon as practicable.

(2) Any case may be continued by mutual consent of the parties when approved by the agency or administrative judge.

Authority: *T.C.A. §§4-5-219, 4-5-301, and 4-5-308.* ***Administrative History:*** *Original rule filed November 22, 1978; effective January 8, 1979. Amendment filed May 23, 1984; effective June 22, 1984. Repeal and new rule filed November 25, 1986; effective January 9, 1987.*

1360-4-1-.11 DISCOVERY.

(1) Parties are encouraged where practicable to attempt to achieve any necessary discovery informally, in order to avoid undue expense and delay in the resolution of the matter at hand. When such attempts have failed, or where the complexity of the case is such that informal discovery is not practicable, discovery shall be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure.

(2) Upon motion of party or upon the administrative judge's own motion, the administrative judge may order that the discovery be completed by a certain date.

(3) Any motion to compel discovery, motion to quash, motion for protective order, or other discovery-related motion shall:

(a) quote verbatim the interrogatory, request, question, or subpoena at issue, or be accompanied by a copy of the interrogatory, request, subpoena, or excerpt of a disposition which shows the question and objection or response if applicable;

(b) state the reason or reasons supporting the motion; and

(c) be accompanied by a statement certifying that the moving party or his or her counsel has made a good faith effort to resolve by agreement the issues raised and that agreement has not been achieved. Such effort shall be set forth with particularity in the statement.

(4) The administrative judge shall decide any motion relating to discovery under the Administrative Procedures Act, *T.C.A. §4-5-101 et seq.*, or the Tennessee Rules of Civil Procedure. The procedures for the consideration of motion are set forth at rule 1360-4-1-.09.

(5) Other than as provided in subsection (3) above, discovery materials need not be filed with either the agency or the Administrative Procedures Division.

Authority: *T.C.A. §§4-5-219 and 4-5-311.* ***Administrative History:*** *Original rule filed November 22, 1978; effective January 8, 1979. Amendment filed May 23, 1984; effective June 22, 1984. Repeal and new rule filed November 25, 1986; effective January 9, 1987.*

1360-4-1-.12 INTERVENTION.

(1) All petitions for leave to intervene in a pending contested case shall be filed in accordance with *T.C.A. §4-5-310*, and shall state any and all facts and legal theories under which the petitioner claims to be qualified as an intervenor.

(2) In deciding whether to grant a petition to intervene, the following factors shall be considered:

(a) Whether the petitioner claims an interest relating to the case and that he or she is so situated that the disposition of the case may as a practical matter impair or impede his ability to protect that interest;

(b) Whether the petitioner's claim and the main case have a question of law or fact in common;

(c) Whether prospective intervenor interests are adequately represented;

(d) Whether admittance of a new party will render the hearing unmanageable or interfere with the interests of justice and the orderly and prompt conduct of the proceedings.

(3) In deciding a petition to intervene, the administrative judge may impose conditions upon the intervenor's participation in the proceedings as set forth at *T.C.A. §4-5-310(c).*

(4) When the validity of a statute of this state or an administrative rule or regulation of this state is drawn in question in any case, the administrative judge shall require that notice be given the office of the Tennessee attorney general, specifying the pertinent statute, rule or regulation, and the attorney general's office will be permitted to intervene or to serve as co-counsel with the state's counsel, if any.

(Rule 1360-4-1-.12, continued)

Authority: *T.C.A. §§4-5-219, 4-5-301(b), 4-5-310, and 4-5-312.* ***Administrative History:*** *Original rule filed November 22, 1978; effective January 8, 1979. Amendment filed May 23, 1984; effective June 22, 1984. Repeal and new rule filed November 25, 1986; effective January 9, 1987. Amendment filed May 31, 1990; effective July 15, 1990.*

1360-4-1-.13 SUBPOENA. The administrative judge at the request of any party shall issue signed subpoenas in blank in accordance with the Tennessee Rules of Civil Procedure, except that service in contested cases may be by certified return receipt mail in addition to means of service provided by the Tennessee Rules of Civil Procedure. Parties shall complete and serve their own subpoenas.

Authority: *T.C.A. §§4-5-219 and 4-5-311.* ***Administrative History:*** *Original rule filed November 22, 1978; effective January 8, 1979. Amendment filed May 23, 1984; effective June 22, 1984. Repeal and new rule filed November 25, 1986; effective January 9, 1987.*

1360-4-1-.14 ORDER OF PROCEEDINGS.

(1) Order of proceedings for the hearing of contested cases when an administrative judge is hearing a case with an agency:

(a) Administrative judge may confer with the parties prior to a hearing to explain the order of proceedings, admissibility of evidence, number of witnesses and other matters.

(b) Hearing is called to order by the administrative judge.

(c) Administrative judge introduces self and gives a very brief statement of the nature of the proceedings, including a statement of the administrative judge's role of making legal rulings.

(d) Administrative judge introduces the members of the agency and states that the final decision in the proceedings will be made by the agency alone, after being charged on the law by the administrative judge.

(e) Administrative judge then calls on the respondent to ask if the respondent is represented by counsel, and if so, counsel is introduced. The administrative judge then introduces the petitioner's counsel and any other officials who may be present at the hearing.

(f) The administrative judge states what documents the record contains.

(g) In appropriate cases, the petitioner reads the charges as set out in the notice with regard to the respondent, while giving references to the appropriate statutes and rules.

(h) In appropriate cases, the respondent is asked how he or she pleads to the charges; if he or she admits the charges, no further proof may be necessary, other than introduction of evidence pertaining to the proper penalty, if appropriate. If he or she denies the charges or fails to admit them, the hearing proceeds.

(i) The administrative judge swears the witnesses.

(j) The parties are asked whether they wish to have all witnesses excluded from the hearing room except during their testimony. If so, all witnesses are instructed not to discuss the case during the pendency of the proceeding. Notwithstanding the exclusion of the witnesses, individual parties will be permitted to stay in the hearing room, and the state or any other party that is a corporation or other artificial person may have one appropriate individual, who may also be a witness, act as its party representative.

(k) Any preliminary motions, stipulations, or agreed orders are entertained.

(l) Opening statements are allowed by both the petitioner and the respondent.

(m) Moving party (usually the petitioner) calls witnesses and questioning proceeds as follows:

1. (Petitioner) moving party questions.
2. (Respondent) other party cross-examines.
3. (Petitioner) moving party redirects.
4. (Respondent) other party re-cross-examines.
5. Agency questions.
6. Further questions by petitioner and respondent.

(Questioning proceeds as long as is necessary to provide all pertinent testimony.)

(n) Other party (usually the Respondent) calls witnesses and questioning proceeds as follows:

1. (Respondent) other party questions.
2. (Petitioner) moving party cross-examines.
3. (Respondent) other party redirects.
4. (Petitioner) moving party re-cross-examines.
5. Agency questions.
6. Further questions by respondent and petitioner.

(Questioning proceeds as long as is necessary to provide all pertinent testimony.)

(o) Petitioner and respondent allowed to call appropriate rebuttal and rejoinder witnesses with examination proceeding as outlined above.

(p) Closing arguments are allowed to be presented by the petitioner and by the respondent.

(q) The administrative judge prepares to turn proceedings over to the agency by charging the agency as to the applicable law, requisites of the final order, voting procedure, and other pertinent matters. The administrative judge will take no part in any finding of fact or conclusion of law, although the administrative judge may advise as to the legal sufficiency of the agency decision and other questions of law.

(r) The administrative judge then turns the proceedings over to the chair of the agency for deliberation and the decision.

(s) The agency deliberates in public and reaches a decision which is communicated to the parties or takes the case under advisement and schedules public deliberations for a later time.

(Rule 1360-4-1-.14, continued)

(2) The order of proceedings for the hearing of contested cases when an administrative judge is hearing the case alone is identical to the procedure outlined in paragraph (1) with the exception that the agency is not present to participate. The parties are informed that an Initial Order will be written and sent to the parties and that the Initial Order will inform the parties of their appeal rights.

(3) Subparagraphs (1) and (2) of this rule are intended to be merely a general outline as to the conduct of a contested case proceeding and it is not intended that a departure from the literal form or substance of this outline, in order to expedite or ensure the fairness of proceedings, would be in violation of this rule.

Authority: *T.C.A. §§4-5-219, 4-5-301(b), and 4-5-312.* ***Administrative History:*** *Original rule filed November 22, 1978; effective January 8, 1979. Amendment filed May 23, 1984; effective June 22, 1984. Repeal and new rule filed November 25, 1986; effective January 9, 1987. Amendment filed May 31, 1990; effective July 15, 1990.*

1360-4-1-.15 DEFAULT AND UNCONTESTED PROCEEDINGS.

(1) Default.

(a) The failure of a party to attend or participate in a prehearing conference, hearing or other stage of contested case proceedings after due notice thereof is cause for holding such party in default pursuant to *T.C.A. §4-5-309*. Failure to comply with any lawful order of the administrative judge or agency, necessary to maintain the orderly conduct of the hearing, may be deemed a failure to participate in a stage of a contested case and thereby be cause for a holding of default.

(b) After entering into the record evidence of service of notice to an absent party, a motion may be made to hold the absent party in default and to adjourn the proceedings or continue on an uncontested basis.

(c) The administrative judge, when sitting with an agency, advises the agency whether the service of notice is sufficient as a matter of law, according to rule 1360-4-1-.06.

(d) If the notice is held to be adequate, the agency, or administrative judge hearing a case alone, shall grant or deny the motion for default, taking into consideration the criteria listed in rule 1360-4-1-.06, subsections (2) (a) through (2) (d), where appropriate. Grounds for the granting of a default shall be stated and shall thereafter be set forth in a written order. If a default is granted, the proceedings may then be adjourned or conducted without the participation of the absent party.

(e) The agency or administrative judge shall serve upon all parties written notice of entry of default for failure to appear. The defaulting party, no later than ten (10) days after service of such notice of default, may file a motion for reconsideration under *T.C.A. §4-5-317*, requesting that the default be set aside for good cause shown, and stating the grounds relied upon. The agency or administrative judge may make any order in regard to such motion as is deemed appropriate, pursuant to *T.C.A. §4-5-317*.

(2) Effect of Entry Default.

(a) Upon entry into the record of the default of the petitioner at a contested case hearing, the charges shall be dismissed as to all issues on which the petitioner bears the burden of proof, unless the proceedings are adjourned.

(b) Upon entry into the record of the default of the respondent at a contested case hearing, the matter shall be tried as uncontested as to such respondent, unless the proceedings are adjourned.

(Rule 1360-4-1-.15, continued)

(3) Uncontested Proceeding. When the matter is tried as uncontested, the petitioner has the burden of establishing its allegations by a preponderance of the evidence presented.

Authority: *T.C.A. §§4-5-219 and 4-5-309.* ***Administrative History:*** *Original rule filed November 22, 1978; effective January 8, 1979. Amendment filed May 23, 1984; effective June 22, 1984. Repeal and new rule filed November 25, 1986; effective January 9, 1987.*

1360-4-1-.16 EVIDENCE IN HEARINGS.

In all agency hearings, the testimony of witnesses shall be taken in open hearings, except as otherwise provided by these rules. In the discretion of the agency, or at the motion of any party, witnesses may be excluded prior to their testimony. The standard for admissibility of evidence is set forth at *T.C.A. §4-5-313*.

Authority: *T.C.A. §§4-5-219, 4-5-312, and 4-5-313.* ***Administrative History:*** *Original rule filed November 22, 1978; effective January 8, 1979. Amendment filed May 23, 1984; effective June 22, 1984. Repeal and new rule filed November 25, 1986; effective January 9, 1987. Amendment filed May 31, 1990; effective July 15, 1990.*

1360-4-1-.17 CLERICAL MISTAKES. Prior to any appeal being perfected by either party to Chancery Court, clerical mistakes in orders or other parts of the record, and errors therein arising from oversight or omissions may be corrected by the administrative judge, if sitting alone, or by the agency, if the matter was heard before them, at any time on the initiative of either the administrative judge or the agency or on motion of any party and after such notice, if any, as the administrative judge may require. The entering of a corrected order will not effect the dates of the original appeal time period.

Authority: *T.C.A. §4-5-219.* ***Administrative History:*** *Original rule filed November 22, 1978; effective January 8, 1979. Amendment filed May 23, 1984; effective June 22, 1984. Repeal and new rule filed November 25, 1986; effective January 9, 1987.*

1360-4-1-.18 PETITIONS FOR RECONSIDERATION AND STAYS TO MULTI-MEMBER AGENCIES.

(1) Petitions for Reconsideration

(a) Any petition for reconsideration to a multi-member agency must include the specific grounds upon which relief is requested and, if the petitioner seeks to present new evidence, a statement of the cause for the failure to introduce the proposed new evidence in the original proceeding and a detailed description of any such new evidence proposed to be introduced, including copies of documents sought to be introduced, identities of proposed witnesses, and summaries of any testimony sought to be presented. However, documents that are unavailable to the person seeking reconsideration at the time of filing the petition may be described in as much detail as is possible and may be provided at a later time, should reconsideration be granted, but not later than three (3) working days prior to any reconsideration hearing.

(b) A multi-member agency may authorize the chair or any other of its members to grant or deny petitions for reconsideration of final orders under *T.C.A. §4-5-317*, to the following extent:

1. Any such petition must be granted within the 20-day time period set at *§4-5-317(c)* or it shall be deemed denied;

2. If a petition is granted by such an authorized member, such member shall set the matter for hearing at the agency's earliest convenience and notify the parties by written order of the decision to grant the petition;

3. The order shall state that, at the hearing to reconsider, the parties shall be allowed to make oral argument on the merits of the petition, the party seeking reconsideration may

(Rule 1360-4-1-.18, continued)

be allowed to present new evidence only if the party shows to the satisfaction of the agency that good cause existed for the failure to introduce the new evidence in the original hearing, and the opposing party shall be allowed to present rebuttal proof if the party seeking reconsideration is allowed to present new evidence; and

4. Any new evidence allowed to be introduced by the party seeking reconsideration shall be limited to that described in the petition for reconsideration as required in subparagraph (1)(a) of this rule.

(2) Petitions for Stays - Any member of a multi-member agency may in his or her discretion schedule a hearing on a petition for a stay under *T.C.A. §4-5-316* by gathering a quorum of the agency; such hearing may be conducted by telephone conference call under the requirements of *T.C.A. §4-5-312*.

Authority: *T.C.A. §§4-5-219, 4-5-312, 4-5-316, and 4-5-317.* ***Administrative History:*** *Original rule filed November 22, 1978; effective January 8, 1979. Amendment filed May 23, 1984; effective June 22, 1984. Repeal and new rule filed November 25, 1986; effective January 9, 1987. Amendment filed May 31, 1990; effective July 15, 1990.*

1360-4-1-.19 FILING OF FINAL ORDERS.

After an agency has made a decision in a contested case hearing, whichever party is assigned the responsibility for drafting the final order shall, after the order is signed by the chair of the agency on behalf of the agency or by the agency members who were present at the hearing, file the order with the Administrative Procedures Division, leaving the original or a copy of the order with the Division. The order shall state that it is deemed entered upon the date that it is filed with the Administrative Procedures Division. The person responsible for drafting and filing the final order with the Administrative Procedures Division shall assure that a copy of the final order with its filing/entry date filled in by the Administrative Procedures Division is mailed to the opposing party, or if such party is represented by counsel, to counsel for the opposing party on the date of filing. All final orders shall contain a clear and concise statement of the available procedures and time limits for seeking reconsideration or other administrative relief and the time limits for seeking judicial review of the final order.

Authority: *T.C.A. §§4-5-219 and 4-5-312.* ***Administrative History:*** *Original rule filed May 31, 1990; effective July 15, 1990.*

1360-4-1-.20 CODE OF JUDICIAL CONDUCT.

Unless otherwise provided by law or clearly inapplicable in context, the Tennessee Code of Judicial Conduct, Rule 10, Canons 1 through 4, of the Rules of the Tennessee Supreme Court, and any subsequent amendments thereto, shall apply to all administrative judges and hearing officers of the State of Tennessee. However, any complaints regarding any individual administrative judge's or hearing officer's conduct under the code shall be made to the chief administrative judge or hearing officer or other comparable entity with supervisory authority over the administrative judge or hearing officer, and any complaints about the chief administrative judge or hearing officer shall be made to the appointing authority.

Authority: *T.C.A. §4-5-321.* ***Administrative History:*** *Original rule filed May 31, 1990; effective July 15, 1990.*